

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 LESLIE GEORGE,

4 Plaintiff,

5 v.

6 WESLEY EDWARD DUTCHER, et. al.,

7 Defendants
8

Case No.: 3:18-cv-00604-MMD-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF Nos. 1, 1-1

9 This Report and Recommendation is made to the Honorable Miranda M. Du, United States
10 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
11 § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro
13 se complaint (ECF No. 1-1).

14 **I. IFP APPLICATION**

15 A person may be granted permission to proceed IFP if the person “submits an affidavit that
16 includes a statement of all assets such [person] possesses [and] that the person is unable to pay
17 such fees or give security therefor. Such affidavit shall state the nature of the action, defense or
18 appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v.*
19 *Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all
20 actions filed IFP, not just prisoner actions).

21 The Local Rules of Practice for the District of Nevada provide: “Any person who is unable
22 to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The
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1 application must be made on the form provided by the court and must include a financial affidavit
2 disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
8 therefore, the application should be granted.

9 **II. SCREENING**

10 **A. Standard**

11 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the
12 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
13 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
14 who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks
17 that language. As such, when reviewing the adequacy of a complaint under this statute, the court
18 applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d
19 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a plaintiff has failed to state a
20 claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule
21 of Civil Procedure 12(b)(6) standard for failure to state a claim."). Review under Rule 12(b)(6) is
22 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723
23 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
 2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395
 3 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less stringent
 4 standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)
 5 (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
 7 action," it must contain factual allegations sufficient to "raise a right to relief above the speculative
 8 level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain
 9 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
 10 cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff
 11 should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see*
 12 *also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
 14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
 15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
 16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff is not a stranger to this court. He has filed many applications to proceed in forma
 19 pauperis, and pro se complaints that contain nonsensical allegations, with no basis in law or fact,
 20 and often without any basis for jurisdiction. *See* 3:16-cv-00616-MMD-WGC (dismissed
 21 complaint with disjointed statements, ECF Nos. 3, 4); 3:16-cv-00679-RCJ-VPC (dismissal of
 22 complaint with rambling, nonsensical allegations, ECF Nos. 3, 4); 3:16-cv-00702-MMD-VPC
 23 (dismissed for failure to state a claim based on rambling and nonsensical allegations, ECF Nos. 3,

1 4); 3:16-cv-00703-MMD-WGC (dismissed for failure to state a claim, ECF Nos. 3, 4); 3:16-cv-
2 00724-RCJ-WGC (dismissed as frivolous, ECF Nos. 3, 4).

3 Plaintiff has once again filed a complaint with disjointed statements that is
4 incomprehensible and fails to state any factually or legally cognizable claim.

5 As the Supreme Court has noted, “a litigant whose filing fees and court costs are assumed
6 by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous,
7 malicious, or repetitive lawsuits.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). “To prevent such
8 abusive or captious litigation, § 1915(d) [now § 1915(e)(2)(B)(i)] authorizes federal courts to
9 dismiss a claim filed [IFP] ‘if the allegation of poverty is untrue, or if satisfied that the action is
10 frivolous or malicious.’” *Id.* “Dismissals on these grounds are often made *sua sponte* prior to the
11 issuance of process, so as to spare prospective defendants the inconvenience and expense of
12 answering such complaints.” *Id.* (citation omitted). A complaint is frivolous “where it lacks an
13 arguable basis either in law or in fact.” *Id.* This term “embraces not only the inarguable legal
14 conclusion, but also the fanciful factual allegation.” *Id.* Section 1915(e)(2)(B)(i) “accords judges
15 not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also
16 the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims
17 whose factual contentions are clearly baseless.” *Id.* at 327. This includes “claims of infringement
18 of a legal interest which clearly does not exist” and “claims describing fantastic or delusional
19 scenarios.” *Id.* at 327-28.

20 Therefore, it is recommended that this action be dismissed with prejudice as frivolous.
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III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain this action without prepaying the filing fee or giving security therefor. This order granting IFP status does not extend to the issuance of subpoenas at government expense.

(2) The complaint (ECF No. 1-1) should be **FILED**.

(3) The action should be **DISMISSED WITH PREJUDICE** as frivolous.

The Plaintiff should be aware of the following:

1. Plaintiff may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of being served with a copy of the Report and Recommendation. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

Dated: February 21, 2019.



William G. Cobb
United States Magistrate Judge